Case No. 17-1650

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

BOSTON MUSICIANS' ASSOCIATION, LOCAL 9-535,

Intervenor,

v.

THE WANG THEATRE, INC., d/b/a Citi Performing Arts Center,

Respondent.

Application for Enforcement of the Decision and Order of the National Labor Relations Board in Case No. 01-CA-179292, Reported At 365 NLRB No. 33.

REPLY BRIEF OF RESPONDENT WANG THEATRE, INC.

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SUMMARY OF ARGUMENT

In their briefs, the National Labor Relations Board ("the Board") and the Boston Musicians' Association, Local 9-535 ("BMA") ignore the actual issues and therefore rely on irrelevant precedent. Not one cited case supports the finding that the Wang Theatre, Inc. ("WTI") was a sole employer of musicians. Not one cited case involved an election where there had been no work in the bargaining unit in the prior year. Not one cited case supports the finding that WTI had a duty to bargain when it knew that there would be no work in the bargaining unit for the foreseeable future. The Board and BMA ask the Court to ignore all this, as well as: the relevant precedent instructing that the non-party producers, if anyone, employed the musicians; logic instructing that WTI, at most, jointly employed the musicians; that the non-party producers controlled whether there could be work in the bargaining unit and might prevent there from ever being any; and that BMA's admitted bargaining goal was unlawful and directed at the non-party producers. At bottom, the Board and BMA ask the Court to ignore the reality in 2016 and instead to focus on a contract that was executed in 2004. But that contractual relationship lapsed after 2007, suggesting that the parties understood, even then, that they had nothing lawful to bargain over. In sum, the Board and BMA confirm that enforcement must be denied for each of the following three reasons.

ARGUMENT

I. The Finding That WTI Solely Employed Musicians Is Not Supported By Substantial Evidence On The Record As A Whole.

The Court must reverse the certification and deny enforcement, because the certification rests on a finding — WTI solely employed musicians — that fails the substantial-evidence standard. 29 U.S.C. § 160(e). Unable to defend that finding, the Board misstates the issue. (NLRB[1] 3.) Citing irrelevant cases (NLRB 16-17), the Board argues as if the sole-employer finding involved an exercise of its "discretion" to determine whether a unit is "appropriate" and to certify an "employer unit, craft unit, plant unit, or subdivision thereof." 29 U.S.C. § 159(b). *See Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 610-11 (1991) (sustaining rules regarding what jobs should be included in a bargaining unit in a particular industry); *Mass. Soc'y For Prevention of Cruelty To Children v. NLRB*, 297 F.3d 41, 45 (1st Cir. 2002) (sustaining certification of a single-facility bargaining unit, where employer argued for multi-facility bargaining unit); *Sandvik Rock Tools, Inc. v. NLRB*, 194 F.3d 531, 534 (4th Cir. 1999) (same); *Friendly Ice Cream Corp. v. NLRB*, 705 F.2d 570, 577 (1st Cir. 1983) (same); *Marriott In-Flite Servs., a Div. of Marriott Corp. v. NLRB*, 652 F.2d 202, 204 (1st Cir. 1981) (sustaining certification of a single-department bargaining unit, where employer argued for plant-wide bargaining unit).

[1] The Board's brief is referenced as "NLRB"; BMA's brief , as "BMA"; the Addendum to WTI's opening brief, as "Add."; and the Joint Appendix, as "JA."

Contrary to the suggestion of the Board, the sole-employer finding is not entitled to a heightened level of deference. As BMA acknowledges (BMA 15-16), the substantial-evidence standard applies. The finding must be "rationally based on articulated facts and consistent with the Act." *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 691 (1980). The Board does not have discretion to rely on "conclusory rationales rather than examination of the facts." *Id*. Nor does the Board have discretion to misapply the law when resolving employer-status disputes. *E.g. S. Prairie Const. Co. v. Local No. 627, Int'l Union of Operating Engineer*, 425 U.S. 800, 806 (1976) (per curiam) (affirming reversal of Board's finding that two entities were not a single employer).

Unlike the issues in the Board's cited cases, the finding that the musicians were employed by WTI and not by the producers was a "determination of pure agency law involve[ing] no special administrative expertise that a court does not possess." *See NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 260 (1968). At one time, under *NLRB v. Hearst Publications*, 322 U.S. 111 (1944), the Board had discretion to "reject conventional limitations" on "conceptions" of "employee" and "employer." *Id.* at 128-29. "Thus the standard was one of economic and policy considerations within the labor field." *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 256 (1968). However, "Congressional reaction to this construction of the Act was adverse." *Id*.

As it has acknowledged, the Board now must "operate within the limits of traditional common law principles" when deciding who is the employer and whether that employment is joint. *See Hy-Brand Industrial Contractor, Ltd.*, 365 NLRB No. 156, slip op. 3 (2017). Amending the Act in 1947, Congress "specifically intended to overturn *Hearst* and to substitute the narrower principles of agency law as the governing test." *NLRB v. Amber Delivery Serv., Inc.*, 651 F.2d 57, 64 n.8 (1st Cir. 1981). Thus, "the term 'employee' is not to be stretched beyond its plain meaning embracing only those who work for another for hire." *Allied Chem. & Alkali Workers of Am., Local No. 1 v. Pittsburgh Plate Glass Co*, 404 U.S. 157, 166 (1971).

Here, the sole-employer finding cannot be squared with the common law and is contrary to decades of precedent. The Board cannot explain how WTI solely employed the musicians when the key indicia of employment — control over the manner and means of performance — lay with the producers. *See Lancaster Symphony Orchestra*, 357 NLRB 1761, 1763-66 (2011). The Board concedes that producers alone controlled and directed the work. (NLRB 22.) The Board resorts to arguing that such control does not inform who is the employer. (NLRB 24.) That lacks commons sense and is contrary to precedent. *See Hy-Brand*, 365 NLRB No. 156, slip op. 8-11 (2017) (applying the test for "servant" and "independent contractor" in analyzing who was the employer); *Browning-Ferris Indus. of California, Inc.*, 362 NLRB No. 186, slip op. 12-14 (2015) (same).

Moreover, the Board cannot distinguish the precedent instructing that WTI was an agent of the producers but not an employer of the musicians. (NLRB 20 n.10.) WTI's role in obtaining musicians was less than the non-employers who "interviewed" employees in *Moses Elec. Serv., Inc.*, 334 NLRB 567, 572, 577 (2001), and *Storall Mfg. Co.*, 275 NLRB 220, 221 n. 3 (1985). The Board and BMA claim WTI set the qualifications. (NLRB 22-23, BMA 34.) But they both cite testimony establishing the producers' control in that area. WTI's witness explained that when a producer had "request[ed]" WTI's "assistance in hiring musicians," WTI has paid a "contractor" — who was also a BMA member — to "go and find the musicians [] requested by the producer." (JA 27-28, JA 56-57.)

Confirming that the sole-employer finding was unprecedented, the Board does not cite a single case supporting it. (NLRB 17-25.) The Board first cites irrelevant cases where a party, unlike WTI, had to prove joint-employer status. (NLRB 17-18.) In one, a union sought a bargaining unit including two entities as joint employers. *See Browning-Ferris Indus. of California, Inc.*, 362 NLRB No. 186 (2015). In the other, the Board's General Counsel alleged an entity was a joint employer and therefore liable for another entity's unfair labor practice. *See Flagstaff Med. Ctr., Inc.*, 357 NLRB 659, 666 (2011). But here, WTI did not solely employ the musicians if they had been jointly employed by WTI, or if they were not "employees" at all, or if they were solely employed by the producers.

Confusing the issue further, the Board next references the irrelevant law regarding when multiemployer bargaining is appropriate. (NLRB 18.) As the Board seemingly acknowledges (NLRB 21 n. 11), that issue is distinct both from who, if anyone, is the employer and from whether any employment is joint. For instance, the case cited by the Board involved whether there was a controlling history of the parties participating in nationwide bargaining between a union-committee, on behalf of various local unions, and an employer-committee, on behalf of various employers in the freight industry. *See Cent. Transp., Inc.*, 328 NLRB 407 (1999).

The Board finally retreats to joint-employer cases that rebut the sole-employer finding. (NLRB 24-25.) In the cited cases, one joint employer controlled compensation and the other supervised and directed the work. *See Greenhoot, Inc.*, 205 NLRB 250 (1973); *Gourmet Award Foods, Northeast*, 335 NLRB 872 (2001). Here, it is undisputed that the producers solely supervised and directed the work. (NLRB 22.) These cases therefore cannot support a finding that WTI had solely employed the musicians. Even if WTI had solely controlled compensation, which WTI did not, these cases would instruct only that WTI had jointly employed the musicians with the producers. As Chairman Miscimarra explained, because the "producers — much more so than [WTI] — control virtually every aspect of the work," it must be that "'employer' status, if it exists, would apply jointly to [WTI] and each producer." (Add. 18.)

In fact, the joint-employer cases cited by the Board instruct that the producers, if anyone, solely employed the musicians. The evidence is that the producers also had the ultimate control over compensation in 2014, when there was last unit work. Although the Board and BMA claim WTI set compensation, neither disputes with contrary evidence that, in 2014, it was the producers who, through their contracts with WTI, required unit musicians be paid union scale. (JA 193, 218.) The Board cites the contract that expired in 2007, and BMA discusses a hypothetical accounting glitch that there is no evidence ever happened. (NLRB 6, BMA 3.) And both ignore the unrebutted evidence that the producers' own labor agreements required that the bargaining-unit musicians be paid at union scale: BMA refused to produce the producers' labor agreements, which presumably say something about this subject; the producer was required to assume the contractual costs of bargaining-unit musicians; and the producer had similarly assumed the contractual cost when it hired local musicians directly in 2015. (Add. 2-3, 18, JA 80, 255, 257).

In sum, contrary to the Board's suggestion (NLRB 24), WTI can rely on logic to establish that the certification must be reversed. It cannot be that WTI had employed the musicians and the producers had not employed them. The producers, if anyone, had employed them. WTI had, at most, jointly employed them. And as the Board now concedes (NLRB 28-29), even if the record could support finding joint employment, the certification cannot be sustained on that basis.

The Board and BMA cannot overcome the common law, decades of precedent, and logic by pointing to a contract that was executed in 2004 and expired in 2007. As an initial matter, contrary to the suggestions by the Board and BMA (NLRB 18, BMA 20 n.16), there was never any finding that WTI was ever a sole statutory employer of musicians. The Board never addressed that issue, unlike in *CNN Am. Inc.*, 361 NLRB No. 47, slip op. at 9 (2014), where it had certified representatives of the units. In any event, whatever had been true during the term of the expired contract, things changed.

After 2007, when the contractual relationship lapsed, WTI apparently lacked sufficient control over the terms and conditions of employment to bargain a successor contract. WTI's witness testified: "[WTI] talked with [BMA], but I would have to say we reached a point where I think we felt that we could not bargain over things we didn't control," including the use of music and musicians —"whether there were live musicians" and "the number of musicians to be employed." (JA 30-31.) During the representation hearing, BMA promised but did not provide any contrary evidence. (JA 40.) In its brief, BMA does not dispute this was why the contractual relationship lapsed. And while the Board reads the testimony of WTI's witness differently (NLRB 19 n. 8), the Board also does not cite contrary evidence regarding why the relationship lapsed.

By 2014, when there was last work in the bargaining unit, the producers controlled the terms and conditions of employment. In the face of that reality, the Board and BMA retreat to irrelevant facts. They both claim that nothing had "changed" (NLRB 19, BMA 18) but omit the material qualifier to the cited testimony: "[o]ther than the fact that [BMA and WTI] don't have a [contract]." (JA 37-38.) In turn, they both cite provisions in the expired contract relating to discipline. (NLRB 18, BMA 8.) But the evidence is that the producers had the potential control over discipline in 2014. (NLRB 22.) BMA also references WTI's labor agreements with other unions. (BMA 25, 27, 32.) But the employees covered by those agreements are supervised by WTI's employees. (JA 25, 59.) The musicians in the bargaining unit were directed by the producers' conductors. (Add. 2-3.)

By 2015, the year prior to the representation case, WTI had no meaningful relationship with musicians. The Acting Regional Director acknowledged that there had been no work in the bargaining unit for over a year, and that there was "no indication" when there would be again. (Add. 5.) In 2014 and 2015, WTI did not source musicians for 41 of the 43 shows, many of which arguably fell within the scope of the expired contract. (Add. 2, JA 106-07, JA 180.) In addition, while WTI had sourced musicians for the producers of two musicals in 2014, it did not for a the producer of a musical in December 2015, which the Acting Regional Director found was "unprecedented." (Add. 2 n.2, JA 180.)

By 2016, during the representation hearing, BMA explained that its goal was an unlawful arrangement with WTI that was ultimately directed at the producers. As the Board acknowledges, the producers control whether bargaining-unit musicians could be hired. (NLRB 27, 37.) While WTI owns the venue, that just means it could pressure the producers and negotiate a hot cargo provision with BMA in a promise to do so. *See Huntington Town House*, 203 NLRB 1078 (1973). And BMA's counsel explained that is what it wanted — WTI to withhold the venue from producers who would not agree to "lay off" their musicians and use bargaining-unit musicians sourced by WTI. (JA 17-18.)

Substantively conceding this goal was unlawful, the Board asks the Court to ignore it because it was only articulated by BMA's counsel. (NLRB 28.) But a party is bound by the representations of its counsel. *Verizon Wireless*, 365 NLRB No. 93, slip op. at 22, n.74 (2017) (citing *Link v. Wabash R. Co.*, 370 U.S. 626, 634, (1962)). The Board again responds with irrelevant cases. In one, a party could not rely on the statements of its counsel. *See Intercity Maint. Co. v. Local 254, Serv. Employees Int'l Union*, 241 F.3d 82, 88 n.4 (1st Cir. 2001). In the other, testimony was credited despite being inconsistent with the opening statement of the Board's General Counsel. *See U.S. Recycling & Disposal, LLC*, 351 NLRB 1090, 1093 (2007). In any event, if there were any doubt that this was BMA's goal, it is erased by its brief, which doubles down on the goal and claims that it is lawful. (BMA 7, 27 n.23.)

BMA's bargaining goal is, in fact, unlawful. As the Supreme Court explained in the case cited by BMA, "a lawful work preservation agreement must pass … the 'right of control' test." *NLRB. v. Int'l Longshoremen's Ass'n*, 473 U.S. 61, 76 (1985). BMA does not even attempt to satisfy the right-of-control test. Indeed, it cannot. "The rationale of the [right of control] test is that if the contracting employer has no power to assign the work, it is reasonable to infer that the agreement has a secondary objective, that is, to influence whoever does have such power over the work." *NLRB v. Int'l Longshoremen's Ass'n,* 447 U.S. 490, 504-05 (1980). Here, as the Acting Regional Director found, the producers have the relevant right of control: "The producer determines whether live or recorded music will be used for a production; whether local musicians will be hired; and if so, how many." (Add. 3.)

In sum, the reason for the lapse of the contractual relationship, the control exercised by producers when there was last work in the bargaining unit, the lack of any recent or expected work in the bargaining unit, and BMA's admitted unlawful bargaining goal directed at the non-party producers, taken together, establish that WTI did not solely employ musicians. Thus, the Board's approval of the bargaining unit rests on a fiction that is not supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e). The Court therefore must reverse the certification and deny enforcement.

II. The Certification Was Arbitrary And Capricious Given The Lack Of Work In The Bargaining Unit And BMA's Unlawful Bargaining Goal.

At the time of the representation proceedings, BMA's goal had to be directed at the producers' labor relations — it could not have wanted to bargain over ghosts. It was undisputed that there had been no work in the bargaining unit in over a year, that there was no expectation of any work in the foreseeable future, that the non-party producers could prevent there from ever being work again, and that BMA sought an unlawful hot cargo provision to create work in the bargaining unit. Holding an election and certifying BMA in such circumstances was arbitrary and capricious and requires reversal.

The Board offers no substantive defense. (NLRB 29-34.) The Board ignores the lack of work, concedes that the producers could prevent there from ever being work, and does not dispute BMA sought an unlawful hot cargo clause. (Add. 5, NLRB 27-28, 37.) Again misstating the issue (NLRB 3, 30-31), the Board cites irrelevant cases establishing its "discretion" to resolve voter-eligibility disputes. *NLRB v. Westinghouse Broad. & Cable, Inc., (WBZ-TV)*, 849 F.2d 15, 18 (1st Cir. 1988). *See also DIC Entm't, LP v. NLRB*, 238 F.3d 434, 436 (D.C. Cir. 2001) (rejecting challenge to eligibility formula); *Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1179 (D.C. Cir. 2000) (same); *BB&L, Inc. v. NLRB*, 52 F.3d 366, 370 (D.C. Cir. 1995) (same); *NLRB v. Atkinson Dredging Co.*, 329 F.2d 158, 164 (4th Cir. 1964) (employer failed to prove voter was ineligible).

Confirming that the certification was unprecedented, the Board does not cite a single case where it has conducted an election without there having been work in the prior year. *See Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1177 (D.C. Cir. 2000) (all eligible voters worked during prior year); *DIC Entm't, LP v. NLRB*, 238 F.3d 434, 435 (D.C. Cir. 2001) (same); *BB&L, Inc. v. NLRB*, 52 F.3d 366, 369 (D.C. Cir. 1995) (same); *Columbus Symphony Orchestra, Inc.*, 350 NLRB 523 (2007) (same); *Trump Taj Mahal Assocs.*, 306 NLRB 294, 295 (1992) (same); *Davison-Paxon*, Co., 185 NLRB 21, 23-24 (1970) (same); *Kan. City Repertory Theatre, Inc.*, 356 NLRB 147, 149-51 (2010) (musicians worked between 25 to 40 performances each year); *Juilliard Sch.*, 208 NLRB 153 (1974) (permanent staff of five complemented by staff fluctuating between 0 and approximately 155).

The Board's silent unprecedented action here requires reversal. It does not have discretion to depart from its precedent without explanation or otherwise act in an "arbitrary or unreasonable" manner during representation cases. *Big Y Foods, Inc. v. NLRB*, 651 F.2d 40, 44 (1st Cir. 1981). *See also NLRB v. Metropolitan Ins. Co.*, 380 U.S. 438, 442 (1965) (abuse of discretion where decisions were seemingly inconsistent and lacked "articulated reasons"); *NLRB v. Purity Food Stores, Inc.*, 376 F.2d 497, 501 (1st Cir. 1967) (abuse of discretion to consider single-store units "presumptively appropriate" where prior case said that the unit "should embrace the employees of all stores within an employer's administrative or geographical area").

III. Regardless Of Whether The Certification Was Proper, WTI Had No Duty To Bargain Under Existing Board Precedent.

Compounding the oddness of the certification, the Board refused to consider if subsequent events affected whether WTI was guilty of an unfair labor practice when it purportedly refused to bargain. The Board claims WTI offered "no new evidence" (NLRB 36), but that is not true. (JA 421-439.)

When opposing summary judgment in August 2016, WTI offered evidence that — within months and for the foreseeable future thereafter — no musician would satisfy the eligibility standard applied in the representation case. To be eligible, a musician had to have worked in the prior two years. (Add. 5.) There had been no work in the bargaining unit since December 2014, and WTI knew that there would be none through at least April 2017. (Add. 2, JA 427, 431.) And given events that occurred after the representation proceedings, WTI expected that there would continue to be no work in the bargaining unit. (JA 426-428.) What was found to be "unprecedented" during the representation case — a producer obtaining its own local musicians — had become the new normal. (Add. 2 n.2, JA 426-427.) The producer of a musical in 2016, like the producer of the musical in 2015, had hired its own local musicians without involving WTI. (JA 426.) In addition, the producer of an upcoming musical also planned to hire its own local musicians without involving WTI. (JA 427.)

Contrary to the suggestion of the Board (NLRB 38 n. 20), WTI did not commit an unfair labor practice that caused the lack of unit work. The Board acknowledges that the producers, not WTI, control whether there could be unit work. (NLRB 37.) Thus, the producers, who never have had an obligation to bargain with BMA, caused the lack of unit work. Moreover, BMA filed but then withdrew an unfair labor practice charge claiming that WTI had refused to hire musicians in violation of the Act. (JA 426-427, 433-439.) This effectively conceded that WTI has no legal obligation to force producers to use bargaining unit musicians. And the Board does not suggest WTI had to negotiate an unlawful hot cargo provision with BMA to create unit work. (NLRB 28.)

WTI therefore can rely on the lack of work to establish that it had no duty to bargain under the Board's existing precedent. Indeed, the Board seemingly concedes that WTI had no duty to bargain if the lack of work in the bargaining unit was not caused by an unfair labor practice. While the Board purports to distinguish its precedent, it does not dispute that an employer has no duty to bargain when it is known that there will be one or fewer "employees" for the foreseeable future. (NLRB 39.) Under existing Board precedent, this is true even when the union has been certified within the prior year. *See Westinghouse Elec. Corp.*, 179 NLRB 289, 289 (1969).

In addition, the Board also fails to point to anything lawful the parties could have negotiated given the lack of foreseeable unit work. (NLRB 40.) BMA did not respond when WTI asked "we are willing to listen to what you would want to bargain over." (JA 391.) In its brief, BMA confirms that it would seek to bargain an unlawful hot cargo provision. (BMA 27 n.3.) The Board's brief states: "[I]f the Union were to seek bargaining over terms and conditions beyond the [WTI's] control, it may file an unfair-labor-practice change and litigate that claim in a subsequent proceeding." (NLRB 27.) This is what WTI tried to litigate as a defense to the unfair labor practice charge, and the Board has yet to explain why WTI was not allowed to do so.

Thus, for two reasons, irrespective of whether BMA should have been certified, WTI did not violate Section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5), under existing precedent. An employer does not have to bargain over an unpopulated bargaining unit, *Westinghouse Elec. Corp.*, 179 NLRB 289 (1969), or over what it does not control, *Miller & Anderson, Inc.*, 364 NLRB No. 39, slip op. at 15 (2016). The Board's tacit departure from precedent here also warrants reversal. *See Good Samaritan Med. Ctr. v. NLRB* 858 F.3d 617, 628–29 (1st Cir. 2017).

What the Board never answers is why it did what it did. While WTI acknowledges that sometimes the Board must adjust its rules, its decision-making process here produced a result that is unprecedented and, as Chairman Miscimarra explained, lacks a semblance of common sense. (Add. 17-19.)

Respectfully submitted,

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Dated: January 2, 2018

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the word limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because, excluding the parts of this brief exempted by Federal Rule of Appellate Procedure 32(f), this document contains 4,018 words.

2. This brief complies with the typeface requirements of Federal Rule Appellate Procedure 32(a)(5) and the type style requirement of Federal Rule of Appellate Procedure 32(a)(6) because this brief had been prepared in proportionally spaced typefaces using Microsoft Word 2010 and is set in Times New Roman font in a size equivalent to 14 points or larger.

/s/ Arthur G. Telegen

Dated: January 2, 2018

CERTIFICATE OF SERVICE

I hereby certify that on December 26, 2017, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system. I certify that the following parties or their counsel of record are registers as ECF Filers and that they will be served by the CM/ECF system: Petitioner National Labor Relations Board; and Intervenor-Interested Party Boston Musicians' Association, Local 9-535.

/s/ Arthur G. Telegen

Dated: January 2, 2018